Virginia Law Register

VOL. XIX.] OCTOBER, 1913. [No. 6

CAN A WOMAN BE A DEPUTY CLERK IN VIRGINIA?

Section 32 of the Constitution provides:

"Every person qualified to vote shall be elegible to any office of the State, or of any county, city, town, or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise. Men and women eighteen years of age shall be elegible to the office of notary public, and qualified to execute the bonds required of them in that capacity."

Under the above section of the Constitution restricting elegibility for State, county, and city offices to qualified voters, it seems that the only theory upon which the above question might be answered in the affirmative would be that the office of deputy clerk is not "an office of the State, or of any county, city, town, or other subdivision of the State," within the meaning of the Constitution.

A deputy clerk being appointed and removed by the clerk at his own pleasure and acting by virtue of that appointment only, it can hardly be said that he is a public officer. His wages are paid by his principal and all of his acts are performed in his principal's name. He derives his authority from and is responsible to his principal only, not to the public. His office is in the nature of a private office, or agency.

"Deputy" is defined by Bouvier as:

"One authorized by an officer to exercise the office or right which the officer possesses for and in the place of the latter."

"Deputy" is again defined as:

"One who exercises an office, in another's right, having no interest therein, but doing all things in the principal's name, and for whose misconduct the principal is answerable." Tomlin L. Dict.; quoted in Willis *v.* Melvin, 53 N. C. 62, 13 Cyc. 1043; Piland *v.* Taylor, 113 N. C. I 18 S. E. 70.

In Herring *v.* Lee, 22 W. Va. 670, it was held:

"The deputy is the mere agent of the clerk and unless he acts by express or implied authority from the clerk his acts are void."

On the other hand an office is:

"A right and correspondent duty to exercise a public or private trust, *and to take the emoluments belonging to it.*" 11 Mich. 466, 84 Va. 574; Blair *v.* Marye, 80 Va. 485.

In Hartigan *v.* Board of Regents, 49 W. Va. 14, 22, 38 S. E. 698, it is held.

"Among the criteria for determining whether an employment is a public office or not, are: That the powers are created by law, and not by contract; and the fixing of the duration or term of office."

By a careful examination of the Constitution itself it can be seen that the clear intent of the framers of that instrument was to distinguish between "officers of the State, or of any county, city, town, or any subdivision of the State," that is, public officers *and their deputies,* and to include both in its provisions. Section 85 reads;

"All State officers, and their deputies, assistants, or employees, charged with the collection, custody, handling or disbursement of public funds, shall be required to give bond."

By providing that "All State officers, *and their deputies assistants or employees, etc.,*" the Constitution makes clear that the intent was to class deputies with *assistants and employees of State officers,* and not as themselves State officers.

Again, § 31 of the Constitution reads as follows:

"No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States Government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar, or judge of election."

The very purpose of this language, it seems, is to distinguish between officers of the State and of the United States, *and the deputies of those officers.* Otherwise, deputies being regarded as officers of the State and of the United States, why add *"and their*

deputies, assistants, etc.," in § 85, and *"nor the deputy of any person"* in § 31 of the Constitution?

Section 817 of the Code provides:

"Any county clerk, the clerk of any circuit or city court, with the consent of the court of which he is clerk, or in any case with the consent of the judge of the court in vacation (the said consent in vacation being given in writing), may appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be a duty the performance of which by a deputy is expressly forbidden by law."

While § 817 provides that a deputy clerk may discharge any of the official duties of his principal during his continuance in office, this really confers upon the deputy only the powers which he already exercised before the statute was enacted. This statute does not allow a deputy to perform any official duties in his own name, or to act in any other way than through his principal and in his principal's name.

The fact that a deputy must give bond and take an oath cannot make his office a public one.

"A contract between a sheriff and his deputy is a private affair, and therefore the bond of the deputy is not an official or statutory bond, with condition prescribed by the statute, but may contain just such provisions to protect the sheriff, and impose duties, obligations, and liabilities on his agent the deputy, as may be inserted in it. It is a common-law bond, not a statutory one." Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999, citing Jacobs *v.* Hill, 2 Leigh 393.

An administrator is required by statute to take an oath and give bond though he is not regarded as a public officer.

See Clay *v.* Robinson, 7 W. Va. 348, 356, which holds:

"An administrator is a mere creature of the law and not a public officer.

Section 817 of the Code provides that a deputy before entering upon the duties of his office, shall take and subscribe the oath *now provided for county officers,* thereby excluding, by implication at least, deputies from the class of county officers.

Our court of appeals in the case of Armory *v.* Justices of Gloucester, 2 Va. Cases 523, rendered the following opinion:

"The court are unanimously of the opinion, and doth decide, that the officers of a deputy clerk of the County Court, and of the Justice of the Peace of the same county are incompatible."

No reasons are given in this decision and it furnishes no grounds upon which it might be argued that the office of deputy clerk is a State or county office. When this case was decided any other decision would have allowed a person to be deputy clerk of a court of which he was one of the judges, and have permitted him to hold two offices one of which was directly under control of the other.

There seems to be no good reason why the appointment of a woman as Deputy Clerk should not be upheld in this State, such appointment not being prohibited directly or by implication either by our constitution, statute or decisions. Such appointments have been held valid by courts of other States which have passed directly upon the question.

"In the absence of any statute or constitutional provision to the contrary the office of deputy clerk may be held by a woman." Jeffries *v.* Harrington, 11 Colo. 191, 17 Pac. 505; Warwick *v.* State, 25 Ohio St. 21, 7 Cyc. 248.

G. M. McNUTT.

Charlottesville, Va.,
Sept. 18th, 1913.